Nos. 12,251 and 12,252

IN THE

United States Court of Appeals

For the Ninth Circuit

J. Howard McGrath, as the Attorney General of the United States, et al., *Appellants, (Defendants Below)* vs. Tadayasu Abo, et al., etc., *Appellees, (Plaintiffs Below)*	No. 12,251
and	
J. Howard McGrath, as the Attorney General of the United States, et al., *Appellants, (Defendants Below)* vs. Mary Kaname Furuya, et al., etc., *Appellees. (Plaintiffs Below)*	No. 12,252

APPELLEES' PETITION FOR A REHEARING.

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Subject Index

Table of Authorities Cited

Cases

Constitutions

Miscellaneous

Statutes

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APPELLEES' PETITION FOR A REHEARING.

(NOTE): The appellees herein are referred to as plaintiffs and the appellants as defendants.

To the Honorable William Denman, Chief Judge, and to the Honorable Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Tadayasu Abo, Mary Kaname Furuya, and all other adult appellees (plaintiffs below), against whom an unfavorable opinion and decisions herein were handed down by this Court reversing the judgments of the District Court below and remanding the causes as to them to that Court, demand a rehearing of their causes on appeal upon the following grounds and for the following reasons:

I.

MATERIAL RECORD FACTS WHICH THIS COURT'S OPINION OVERLOOKED IN DECIDING APPEALS.

The plaintiffs' motions for judgment on the pleadings and the respective motions for summary judgment were submitted to the trial Court on November 18, 1946. The affidavits in support thereof and the final brief had been filed by February 11, 1947. On February 20, 1947, the cases were transferred to Judge Goodman because of the illness of Judge St. Sure. (See Opinion at R. 176 in No. 12,195 reciting these facts.) Thereafter, the trial Court considered the motions over a period of approximately eight (8) months until October 10, 1947, without a ruling being made thereon.

On October 10, 1947, in each equity case, the parties entered into the written Stipulation (R. 408(a)), submitting the causes to the trial Court for decision on the merits. It was so ordered, R. 408(b). In this Court's Opinion a portion of that Stipulation is quoted but a sig-

nificant part thereof which is highly material to the issues was not quoted and, what is more significant, appears to have been overlooked by this Court. The Stipulation reads as follows:

"STIPULATION

It is stipulated between the parties hereto that this case be submitted for decision to the Court on the cause, that is, on the merits and the present record as it stands, including any evidence by way of affidavits and exhibits submitted on the respective motions for summary judgment and for judgment on the pleadings that is legally admissible as competent, relevant and material evidence against the objections and exceptions made thereto and against the motion made to suppress the same, and that the proofs be closed provided, however, that if the Court deems it necessary for a proper decision of any factual or legal issue or issues involved in this case as to any particular plaintiff or plaintiffs the Court shall order the production of further or additional evidence thereon and, in such an event, the parties hereto shall have the same rights in respect to the introduction of such further or additional evidence as to any such plaintiff or plaintiffs as they would have had if they had not entered into this stipulation.

Dated: October 10, 1947."

It was the understanding and intention of the parties plaintiff and defendant, counsel for the respective parties, and of the trial judge that the causes thereby were submitted to the trial Court for decision on the merits of the evidence which theretofore had been submitted by the parties on the motions for summary judgment. The par-

ties deemed that evidence, coupled with facts of which the Court could take judicial cognizance, was adequate for a complete determination of the factual and legal issues. There was no conflict in the evidence on the issue of factual duress—the conflict was simply one concerning which of the various duress factors or combinations thereof caused the renunciations.

Further, it was explicitly understood and it was the intention of the parties that the *proof be closed* and that no additional evidence whatever was to be introduced or offered by either side. Each of those Stipulations expressly provides:

> "* * * the proofs be closed provided, however, that if the Court deem it necessary for a proper decision of any factual or legal issue or issues involved in this case as to any particular plaintiff or plaintiffs the Court shall order the production of further or additional evidence thereon and, * * *"

The parties plaintiff and defendant, after some eight (8) months of negotiation and discussion decided that they respectively would risk a decision on the merits by such a submission of the causes on that basis. Under that Stipulation and the order which issued thereon submitting the causes both sides produced and submitted all the evidence they desired to submit. Both sides realized that if the facts were resolved against one side that side would be bound by those findings. If the parties were willing to run that risk, especially the plaintiffs who had everything at stake while the defendants had nothing at stake, it ill becomes this Court to ignore the provisions of the Stipulations and, in effect, to set them aside and re-

verse judgment as to the adult plaintiffs. There were powerful reasons why the defendants, up to and including the submission date, did not offer or even attempt to offer any such evidence as is mentioned in the offers of proof in the Designations later filed by counsel who succeeded those acting for the defendants when the causes were submitted. The reasons they did not do so hereinafter are set forth.

The trial Court did not order designations to be filed or the production of further or additional evidence.

We direct attention to the fact that the trial Court *did not deem* it necessary to order the production of further or additional evidence as to any plaintiff or plaintiffs. It *did not order the production of further or additional evidence* as to any particular plaintiff or plaintiffs. *It did not order any designations to be filed.* Neither the Stipulations submitting the causes (R. 408(a)) nor the Order of Court made thereon (R. 408(b)) were ever nullified or set aside by the trial Court.

In its Opinion this Court assumed that the trial Court ordered the defendants to produce further or additional evidence. However, that assumption is erroneous and is based upon a misconstruction of those Stipulations and the Orders of Court which issued thereon submitting the causes in accordance with the terms thereof.

The trial Court's Opinion, at R. 426-7, giving the defendants 90 days within which to designate states:

> "It may be that if the defendants were to go forward with further proof, they could present evidence that certain of the plaintiffs individually acted freely

> and voluntarily despite the present record facts. Therefore, it is further ordered that defendants may have 90 days from date hereof within which to file a designation of any of the plaintiffs concerning whom they desire to present further evidence. As to any plaintiff, not so designated by the defendants within the time specified, a final decree may enter. As to any plaintiff designated in the manner and within the time specified, further hearings, after notice duly given, will be held."

The trial Court's Opinion giving the defendants that time within which to designate *certain of the plaintiffs* against whom they might wish to present further evidence *is not an order* to them to do so and is not even a direction to them to do so as against certain plaintiffs, all plaintiffs, or any plaintiff. It is nothing but an invitation at most, or courtesy shown them or an opportunity given them to designate certain, not all, plaintiffs, conditioned on strict compliance with the proviso in the Interlocutory Decree, at R. 431, that any such Designation that might be made must be made *"in an exercise of good faith"*, and must be such a Designation as was contemplated and understood might be made. Neither the Opinion nor the Interlocutory Decree can be construed to evince an intention that the trial Court designed them to enable the defendants to convert the Stipulations and Orders submitting the cause into nullities or to enable them to reopen the causes as to all the plaintiffs. Every intendment is against any such absurd construction.

The Interlocutory Decree does not order the defendants to designate any plaintiff or plaintiffs and it does not order the defendants to produce any further or addi-

tional evidence as to any plaintiff or plaintiffs. It merely extends an opportunity to the defendants to make a proper designation as contemplated in the Opinion and conformable thereto. Neither the trial Court's Opinion nor the Interlocutory Decree nullified the Stipulations and Orders submitting the causes or reopened the causes as to all the plaintiffs.

II.

THE DESIGNATIONS WERE SHAM AND PROPERLY WERE STRICKEN.

The Designations filed by the defendants *name all the plaintiffs* by grouping their names into various insignificant classifications. In consequence, they were not Designations at all. They were not filed in good faith. They were sham. They properly were stricken.

Neither the Stipulations submitting the cause, the Orders of submission, the trial Court's Opinion or the Interlocutory Decrees authorized any offers of proof to be made. The *proofs were closed* by the Stipulations and the Orders submitting the cause. It is to be assumed that the defendants entered into those Stipulations in good faith and with intent to abide by them at the time of submission. They did abide by them until after the Opinion, R. 410, was handed down and thereafter until they filed the spurious Designations.

After the cause was submitted on the merits the defendants had ten (10) months' time within which to prepare and file proper Designations *in good faith.* The bare fact that, contrary to the trial Court's Opinion and the

Interlocutory Decrees allowing defendants to go forward with further evidence as to certain plaintiffs who might be designated, the defendants filed spurious Designations naming not certain plaintiffs but all the plaintiffs, is sufficient proof that the defendants made no attempt whatever to comply with the permission given them to designate certain plaintiffs if done in good faith. Furthermore, the fact that the defendants took a full ten (10) months' time just to file Designations simply listing all the plaintiffs by name, under various subheadings, with offers of proof covering matters the Court already had decided proves the Designations were dilatory and constituted sham.

We direct attention to the fact that the defendants had from October 14, 1946, when plaintiffs' motions for summary judgments were served on defendants and filed below (R. 146), to October 10, 1947, when the parties entered into the Stipulations (R. 408a) submitting the causes on the merits, within which to submit to the Court below the very evidence to which their offers of proof refer. They declined to do so because (1) the issues of factual duress and coercion as they affected each plaintiff already had been tendered by ample evidence, in the form of affidavits, pleadings stipulated to be used as and to be considered as though they had been made and filed by each plaintiff on his or her own behalf, and matters of which the trial Court might take judicial cognizance; (2) the introduction of voluminous individual records and matters pertaining to each plaintiff, including their responses to Question No. 28 in the questionnaire, questions whether they were Kibei, had spent some time in Japan,

had requested to be sent to Japan, etc., would serve no purpose except to clutter up the Court records.

The evidence offered by both sides at the time of submission was offered for the purpose of having determined all the factual issues as to all the plaintiffs. Neither side intended to introduce any additional evidence. The affidavit of John Burling tendered the whole of the government's defense to the suits with the frank statement of the factual duress which caused the renunciations. See R. 208 where he states, in summary:

> "If these factors and this hysteria render the act of renunciation by persons detained under these circumstances void, then the renunciations are void. If the court is now to hold that the totality of the circumstances described in this affidavit constitutes coercion, then these renunciations were coerced."

The defendants also declined at the time the causes were submitted to the trial Court to introduce or offer any such evidence as is referred to in the offers of proof in the Designations because they did not deem any of it to be admissible for reasons and rules of law hereinafter discussed. They had ample opportunity to offer any such evidence up to the time the causes were submitted for decision. They declined to do this. That constituted a waiver of any right to do so later. We see no reason why they now, under this Court's Opinion, should be permitted to do what they had ample opportunity to do up to the time of submission and failed to do for good reasons.

The documents the defendants eventually filed some ten (10) months after the Opinion of the trial Court had

been handed down were not proper or authorized Designations at all. They are lists of all the plaintiffs classified under various headings with statements of what generally might be offered to prove the classifications. The Designations were not filed in good faith. They demonstrate, however, that the trial Court and counsel for plaintiffs had been misled into believing that if the defendants were to file designations they would be ones made and filed in an exercise of good faith against only a few of the plaintiffs. See motion to strike, R. 442; affidavit in support thereof, R. 445, and order striking designations, R. 455, 449. We see no good reason why this Court, on the basis of these record facts, now should permit the defendants on the basis of those spurious Designations to reopen the causes as to all adult plaintiffs. Further, we submit that no jurisdiction is lodged in this Court to set aside those Orders Striking the Designations for sham because those orders were made upon motions supported by affidavit and facts of which that Court had actual as well as judicial knowledge and, as hereinabove pointed out, without any real opposition thereto on the part of the defendants. Inasmuch as the findings of fact made on evidence adduced on those motions were clearly correct they cannot be set aside. No supervisory jurisdiction to set aside such findings of the District Court is lodged in this Court. We point out that this Court has overlooked the significance of this important matter for its Opinion contains no reference thereto.

III.

THIS COURT'S OPINION FAILED TO CONSIDER THE FACT THAT THE DESIGNATIONS FILED WERE NOT SUCH AS WERE AUTHORIZED AND WERE NOT FILED IN GOOD FAITH AND PROPERLY WERE STRICKEN.

The Interlocutory Orders, Judgments and Decrees, R. 430, at 431, specifically provided that any Designation that might be filed by the defendants must be filed *"in an exercise of good faith"*. The defendants had a period of ten (10) months (303 days) from April 29, 1948, (the Opinion date) to February 25, 1949, within which to examine their records and file such documents. The Designations were not filed in good faith. Plaintiffs' motions to strike the Designations were made on the charge that those documents were *"not filed in good faith"*. See R. 442 at 444. The issue of whether or not they were filed in good faith was a matter for the trial Court to determine—and not a matter for this Court to pass upon in the absence of an abuse of legal discretion by the trial Court. The trial Court ruled on the motion and struck the Designations because he found as a fact that they were not filed in good faith. The affidavit of February 28, 1949 (R. 445), supporting the motion to strike sets forth the specific evidentiary grounds therefor. Those grounds also were matters of which the trial judge had actual knowledge and were matters of judicial knowledge. They proved that the Designations were not filed in good faith. Further, that motion came on regularly for hearing on March 21, 1949, before the Court. Oral argument was had thereon. *The defendants did not file any counter affidavits in opposition.* That was an admission that the Designations were not filed in good faith. The oral argu-

ment made on behalf of the defendants, which is not evidence, consisted of reading to the Court a letter of instructions to defendants' counsel. (This is set forth at R. 456). It is a masterpiece of evasion. Its context admits that the most the Attorney General could do, insofar as evidence was concerned, was to make in this cause:

> "as strong a case as can be made for sustaining the validity of the renunciations as were made in the cases now on appeal from the decisions of the District Court for the Southern District of California. In view of that fact and in view of Judge Goodman's opinion in the instant cases, the Attorney General feels that he cannot properly concede that the renunciations of any of the designated plaintiffs were involuntary as a matter of fact or law. He, of course, reserves the right to take a different position in the event that the decisions now on appeal should be sustained."

The reference in that letter to the cases on appeal are to the Murakami and companion cases. The letter admits that the most the Justice Department could do in the instant cases was to present a case as strong as those it presented in the Murakami and companion cases. Inasmuch as the Justice Department had lost the Murakami and its companion cases in the trial Court and thereafter lost on appeal in this Court it is difficult to see, in the light of that admission, how it could produce evidence enough to prevail in the instant cases. The instant cases could have been decided by the trial judge in favor of the petitioners and against the defendants solely upon such an admission had it been made on or before the submission of the cause on the merits to the trial Court.

Further, on the merits of the motion to strike and order to show cause why the Designations should not be stricken, the trial Court found (R. 457-459) that the Designations were not filed in good faith and in nowise conformed to or complied with the Court's Opinion, the Interlocutory Order, Judgment and Decree, and were not of the type for which the defendants were given an opportunity to designate but were sham.

The fact that the Designations were sham and were never even intended in good faith to constitute Designations in compliance with the permission given is evidenced clearly by the fact that in the Designation filed February 25, 1949, Exh. XXII-1, it is admitted that the eight (8) plaintiffs there named were insane at the time their renunciations were taken, and in Exh. XXI-1 that the renunciations of the eight (8) plaintiffs there named had not been approved.

In the face of the foregoing facts, proved by the record, we submit that the trial Court did not abuse its discretionary power but acted entirely within the limits of judicial discretion in striking the Designations for good cause shown. In consequence, we submit that this Court is bound by the record and by the finding of the trial Court on this issue. We suggest that for this Court to ignore the record facts and the finding of the trial Court thereon constitutes an abuse of judicial discretion and is an attempted exercise of a power and control over the District Court below which is not lodged in this Court. Because the Designations properly were stricken the plaintiffs were entitled to a final judgment. This is true whether the plaintiffs sustained their burden of proof to

establish their sought for relief by a preponderance of direct evidence proving the ultimate facts or simply through the operation of a presumption. In either event the plaintiffs were entitled to judgment. If the presumption theory is invoked the judgment was proper because it is the rule of the Ninth Circuit (*Department of Water and Power v. Anderson,* (CCA-9), 95 Fed. (2d) 577, 583-5), that the trial judge, sitting without a jury, was required to draw the inference the renunciations were the products of coercion. If the trial Court had applied only the California rule relating to presumptions (*Pozzobon v. O'Donnell,* 1 Cal. App. (2d) 151), it attached weight to the inference, although not required so to do, because of its compelling force and accuracy in arriving at the truth.

IV.

THIS COURT HAS NO SUPERVISORY CONTROL OVER THE DISTRICT COURT BELOW TO IGNORE ITS FINDINGS ON THE MERITS SUPPORTED BY AMPLE EVIDENCE OR TO SET ASIDE THE ORDERS STRIKING THE DESIGNATIONS FOR GOOD CAUSE SHOWN.

Rule 52(a) of the Federal Rules of Civil Procedure provides that "Findings of fact shall not be set aside unless clearly erroneous." The trial Court had considered, on the submission of the causes, all the evidence which the defendants' offers of proof in their Designation do but reiterate and re-tender. It had rendered its Opinion deciding those issues. Thereafter it specifically found that the Designations and offers of proof related to nothing but matters which already had been considered and de-

cided and, therefore, struck them out as constituting sham. See Order Striking, R. 457-8. We submit that this Court's supervisory control over the District Court below does not extend to revising the trial Court's findings either on the evidence submitted on the cause or on the evidence submitted on the motion to strike those Designations because those findings were not erroneous but were based upon substantial evidence.

V.

ALL MATTERS SPECIFIED IN OFFERS OF PROOF IN THE DESIGNATIONS ALREADY HAD BEEN CONSIDERED, WEIGHED AND PASSED UPON BY THE TRIAL COURT AGAINST THE GOVERNMENT.

The fact that any plaintiff was a Kibei, had received some education in Japan, had been a member of any of the suspected organizations at Tule, had requested to be sent to Japan, had been suspected of disloyalty, was under a removal order or was not under a removal order was tendered by the affidavits and other evidence on which the cause was submitted to the trial Court for decision. The offers of proof in the Designations do nothing but list all the plaintiffs under those classifications. The trial Court already had considered, weighed and found from the evidence before him that membership in organizations and requests to be sent to Japan were the results of the unconstitutional detention and coercion. It already had considered, weighed and found that being a Kibei, having received some education in Japan, having been suspected of disloyalty and being under a removal

order had no relevancy except to explain the reason for evacuation, detention and internment. The offers of proof contained in the Designations specified nothing that had not already been tendered by the evidence and nothing that had not already been considered by the trial Court and been resolved in favor of the plaintiffs. See Order Striking Designations at R. 457-8 so stating.

Because these evidentiary matters were resolved by the trial Court in favor of the plaintiffs on adequate evidence these issues should not be reopened simply to satisfy the whims of the Justice Department. The conditional permission given to the defendants by the trial Court to go forward with further proof as to certain plaintiffs (R. 426-7) did not authorize the reopening of issues which already had been decided in favor of plaintiffs. We suggest that this Court has overlooked these important matters in its Opinion and that it gave no consideration thereto.

The trial Court found that those renunciants who, despite the coercion, acted freely and voluntarily in renouncing were not in the suit. See, Opinion, R. 415, which states, "However, these are not the renunciants who are here seeking restoration of citizenship. Those who did act freely were members of the pro-Japanese organizations at Tule Lake, who have already been repatriated to Japan in accordance with their express wishes." We direct attention to the fact that this clearly referred to the citizens in the group of 62, mentioned in the Burling affidavit, R. 166, none of whom were in the suits or believed to be or intended to be included therein. Inasmuch

as their names were not supplied by the Justice Department the trial Court evidently left the matter open for the Justice Department to show whether any of them might have joined in the suit. This would explain why its Opinion, at R. 426-7, gave the defendants an opportunity to designate in the first place.

The fact that some of the petitioners may have been members of the so-called pro Japanese organizations at Tule Lake was considered by the trial Court. That fact was tendered by the affidavits. See R. 265. The Court below considered this matter. See its Opinion at R. 412, showing it was considered and R. 425 where it held that such members acted abnormally because of abnormal conditions not of their own making and that, by reason thereof, although they may have detrimentally affected others, they were not to be held responsible. The trial Court considered the fact that many renunciants had been transported to Japan on their requests (R. 150) made in the concentration camp. See Judgment at R. 484, where defendants were restrained from interfering with their right to return and R. 490 where it modified the injunction as to the Secretary of State and his consular agents in Japan. The transportation to Japan on their requests made during unconstitutional confinement was treated by the trial judge as being a direct product of the coercion.

VI.

IT IS IMPOSSIBLE FOR THE GOVERNMENT TO OVERCOME THE PROOF AND PRESUMPTION OF COERCION.

This Court has gone out of its way to state in its Opinion that the vague proposed evidence as to each group of plaintiffs specified in the spurious Designations the defendants would like to offer, save as to one group of 58 plaintiffs, "would overcome the presumption of coercion". We direct attention to the fact that this Court is not a sifter, finder and weigher of fact. That statement is erroneous and ought to be deleted from the Opinion because it might be construed by a trial Court to constitute a direction to it on the weight to be attached to evidence, a matter we submit is wholly within the province of a trial Court or a jury to consider, weigh and determine. The trial Court's Order Striking the Designations at R. 449-450 demonstrates it previously had considered all the matters later set forth in the offers of proof and had decided that such matters were insufficient to meet the plaintiffs' evidence of coercion. In consequence, this Court erred in even stating that any such evidence as is referred to in the offers of proof would overcome the presumption of coercion.

VII.

EQUITY APPEALS INVOLVE TRIALS DE NOVO IN APPELLATE COURT AND IN CONSEQUENCE THIS COURT SHOULD GIVE CONTROLLING EVIDENTIARY WEIGHT TO GOVERNMENT'S ADMISSION AND TO PLEADINGS USED, PER STIPULATION AND COURT ORDER, AS THOUGH THEY WERE INDIVIDUAL AFFIDAVITS FILED BY EACH PLAINTIFF.

The trial Court, R. 414, did not consider the effect of the Fortas letter (R. 75) because it was stricken as a pleading. It was introduced as evidence in the affidavit of Besig at R. 284-5 and was annexed thereto. As an official communication and also as an admission of the government it is controlling on the issue of factual duress for it specifies that *every renunciation* was caused by duress. This Court on this appeal has the power and duty to give effect to that official admission and to attach controlling weight to it. The admission (R. 77) is that over 80 percent of the confined citizens eligible to renounce did so primarily because of the pressures of organizations. The organizations were government sponsored.

Because these appeals in equity in essence and fact involve trials de novo on appeal this Court can and should consider and should attach controlling weight to that governmental admission because it is part of the evidentiary record on appeal even though the trial Court did not consider it. See *Hopkins v. Texas Co.* (CCA-10), 62 Fed. (2d) 691, cert. den. 290 U.S. 629; *Arco Equipment Co. v. Herring Wissler Co.* (CCA-8), 84 Fed. (2d) 619; and 5 C.J.S., p. 247, Sec. 1526 et seq., for expressions of this rule.

The verified complaint, supplement thereto and the amended complaint were filed as and for affidavits for each of the plaintiffs in lieu of filing separate affidavits for each plaintiff. The Stipulation (R. 408a) and Order thereon (R. 408b) so provide. See R. 224. They are to be treated as though they were affidavits made and filed by each individual plaintiff for and on his own behalf. They allege each renounced as a result of his or her mental fear and physical duress induced by the conditions prevailing in the concentration camp. This Court's Opinion ought so to have treated them.

VIII.

THE RENUNCIATIONS ARE ILLEGAL AND THE PURPORTED EVIDENCE DEFENDANTS' OFFER OF PROOF PROPOSES TO INTRODUCE AGAINST PLAINTIFFS AND OBTAINED FROM THEM DURING DETENTION IS ILLEGAL AND INADMISSIBLE UNDER UPSHAW AND McNABB RULES.

The renunciation applications made by the plaintiffs during their unconstitutional internment, and any requests any of them made to be sent to Japan and any statements made at their renunciation hearings are illegal on their face and are inadmissible in evidence. Those things fall into the classification of extrajudicial confessions made by them during a long imprisonment, inflicted upon them for no reason except the irrelevancy of racial origin, and from which they had no expectation of release except to face a hostile community in an impoverished condition or to seek deportation to Japan to avoid indefinite internment. They are illegal and inadmissible

under the rules laid down in *Upshaw v. U.S.*, 335 U.S. 410, and *McNabb v. U.S.*, 318 U.S. 332. (We direct attention to the fact that the trial judge's Opinion (R. 425) shows that the *McNabb* decision was considered and its rule was applied by him to the instant cases.) The rules there laid down hold illegal and forbid the introduction of statements and documents made during a long confinement, and also forbid the detention of persons for the purpose of investigation. We direct attention also to the fact that all the plaintiffs were and long had been detained for investigation purposes and were under investigation by the government at the time of renunciation. Further, we also draw attention to the fact that all of them were held without accusation having been filed against them and without hearings being afforded any of them on the reason or question of necessity for their detention.

Counsel for the defendants were aware of the existence of the foregoing rule and of the *McNabb* decision at the time the causes were submitted to the trial Court below for decision of the merits. It was because of that rule that they did not attempt to introduce any such evidence as is mentioned in the purported offers of proof subsequently made in the spurious Designations later prepared and filed by their successors.

IX.

THE RENUNCIATIONS ARE ILLEGAL AND THE PURPORTED EVIDENCE DEFENDANTS' OFFER OF PROOF PROPOSES TO INTRODUCE AGAINST PLAINTIFFS AND OBTAINED FROM THEM DURING DETENTION IS ILLEGAL AND THESE ARE INADMISSIBLE FOR BEING THE FRUITS OF WRONGDOING BY THE GOVERNMENT.

The renunciations taken by the Attorney General while the plaintiffs were held in concentration camps, pursuant to the admitted governmental objectives for which the statute was enacted (R. 158-161), i.e., to insure their continued detention or to remove them to Japan, are illegal on their face for being *"the fruits of wrongdoing"* by the federal government and its agents. Likewise, any statement or declaration they made at the renunciation hearings or during their long detention were the "fruits of wrongdoing" and are illegal and could not be introduced in evidence or used against any of the plaintiffs. The government cannot prevail over the plaintiffs by asserting its own wrongs or the wrongs of its own agents. See principle announced in *Weeks v. U.S.*, 232 U.S. 383; *Upshaw v. U.S.*, 335 U.S. 410; *McNabb v. U.S.*, 318 U.S. 332; *Lustig v. U.S.*, 338 U.S. 74. Counsel for the defendants at the time the causes were submitted to the trial Court for decision on the merits were aware of the existence and applicability of this rule. It was one of the reasons they were anxious to submit the causes on the evidence which had been adduced without making a futile endeavor to introduce any such illegal statements and documents. To make certain that no such inadmissible evidence could creep into the cases through the medium of the affidavits filed by the defendants the plaintiffs filed their objections

thereto and motion to strike, R. 318, and like objections, motion to strike and to suppress evidence illegally obtained, R. 397.

X.

THE RENUNCIATIONS AND THE PURPORTED EVIDENCE GOVERNMENT'S OFFER OF PROOF PROPOSES TO INTRODUCE ARE ILLEGAL AND INADMISSIBLE BECAUSE PROCURED BY INDUCEMENT.

Whether the government, through the instrumentality of renunciation, offered the plaintiffs internment as security against facing a hostile community in an impoverished condition or removal to Japan as liberation from prolonged and indefinite internment, the only two alternatives open to them, (or for any other reason for that matter), the renunciations as such offers were illegal *inducements* made by the government which invalidate the renunciations. They are void for constituting a deprivation of the due process of law guaranteed by the 5th Amendment. See *Bram v. U.S.*, 168 U.S. 532. Renunciations or any statement made by a person during internment are illegal and could not, in any event whatever, be admitted into evidence unless they were entirely free from *coercion* and from *inducement*. See *Bram v. U.S.*, supra; *Watts v. Indiana*, 338 U.S. 49; *Turner v. Pennsylvania*, 338 U.S. 62; and *Harris v. South Carolina*, 338 U.S. 68. Counsel for the defendants were aware of the existence and applicability of this rule at the time the causes were submitted for decision on the merits. That also is one of the reasons why they were willing to submit the cause on the merits of the evidence adduced

without making a fruitless attempt to introduce any such statements and documents which they knew to be clearly inadmissible. The offers of proof proposed by counsel who later represented them relate to just such statements and documents and are inadmissible.

XI.

THE RENUNCIATION APPLICATIONS AND ALSO THE PURPORTED EVIDENCE DEFENDANTS' OFFER OF PROOF PROPOSES TO INTRODUCE ARE ILLEGAL AND ARE INADMISSIBLE UNDER BRAM RULE BECAUSE GOVERNMENT CANNOT LAY FOUNDATION OF VOLUNTARINESS.

The renunciation applications signed by petitioners during their internment, and any request any of them made to be sent to Japan or other statements made at their renunciation hearings or during their detention are not admissible in evidence on other grounds in addition to those laid down in the *McNabb* and *Upshaw* cases. The defendants did not offer to introduce any such statements and documents on or by the time the cause was submitted to the trial Court below for decision on the merits because counsel then representing them were aware of the fact that the defendants could not meet *their burden of first laying a preliminary foundation that they were voluntarily made* by the renunciants. See *Bram v. U.S.*, 168 U.S. 532, 549; *Litkofsky v. U.S.* (CCA-3), 9 Fed. (2d) 877, 882. See also *Mangum v. U.S.* (CCA-9), 289 Fed. 213, 215, where this Court held that before such matter could be admitted the trial Court must determine the question of voluntariness preliminarily. Although those

cases relate to confessions involved in criminal cases it is to be presumed the rule they announce concerning the introduction of such evidence is applicable to civil cases which involve loss of citizenship status, all civil rights and banishment which, in itself, is criminal or at least quasi criminal punishment.

Note also that the trial Court below determined that the renunciations of the plaintiffs were involuntary on the basis of the evidence before it which was conflicting in nature only as to the combination of factors which accounted for them. It was also because the defendants' counsel recognized that they could not lay a preliminary foundation that the renunciations, or any statements or declarations of the plaintiffs were voluntary that they were content to submit the cause on the evidence they supplied at the time.

The renunciation applications, statements made at the renunciation hearings and requests to be sent to Japan made by some, all made during their unconstitutional detention, all fall into the classification of extra-judicial confessions. At those pseudo-hearings held by Justice Department agents each plaintiff was confined in a closed room with government agents and was deprived of the benefit of counsel, witnesses and friends. See R. 176-177 admitting this. In consequence, such statements and documents are not admissible under the *Bram* rule unless the government first lays a foundation that such were made voluntarily by the plaintiffs. Inasmuch as this was a burden impossible for the government to meet, in view of the long imprisonment and the proved conditions existing

in the concentration camp, no good purpose is served by having the cause reopened as to the adults just to give the government another chance to offer evidence its counsel recognized was inadmissible because the government could not lay that preliminary foundation that the renunciation applications and any such statements or documents were made voluntarily and were not the products of the unconstitutional detention, fear, undue influence, coercion and duress.

XII.

THIS COURT'S OPINION OVERLOOKED FACTORS WHICH RENDER THE STATUTE VOID FOR DENYING EQUALITY AND DUE PROCESS OF LAW.

The renunciation statute, Title 8 USCA, Sec. 801(i), (Act of July 1, 1944, (58 Stat. 677)), was enacted by Congress at the special instance and request of the Justice Department for the disclosed sole purpose of procuring the renunciations of a special group of Nisei detained in our concentration camps simply to insure a prolongation of their unconstitutional internment and for no other purpose whatsoever. See Burling affidavit, No. 12251-2, so admitting and relating its history. It was applied to them and to no other persons or class of persons. When the renunciations of Nisei had been obtained in the concentration camps and their continued internment thereby was assured and the Attorney General had time to approve and did approve those renunciations by the middle of 1947, Congress, obviously on the suggestion of the Attorney General, by Joint Resolution of July 25, 1947, 61

Stat. 449 at 454, *rendered the statute inoperative,* along with a large number of other emergency and war power measures.

If the renunciation statute is not special class legislation there is no such thing as class legislation. If, as applied to petitioners, it was not an unequal application of the law there is no such thing as an unequal application of the law. The test of equality in the application of a law, within the rule announced in *Yick Wo v. Hopkins,* 118 U.S. 356, is not whether legislation might or could be applied equally to all persons within a proper classification but whether or not it actually so is applied. If the Justice Department can use a consenting Congress to pass temporary legislation, in the guise of permanent legislation, for it to apply only to Nisei held in prison simply because of their lineage and, so soon as its agents have procured their renunciations and the Attorney General has been given time to approve those renunciations, then has Congress render the statute inoperative so that it cannot be applied to others it is obvious the law is special discriminatory class legislation and that it was applied with an evil eye and an unequal hand.

The motive that prompted the passage of the statute, the purpose to which it was put and the fact that it was rendered inoperative immediately the special purpose had been served, thereby blocking all other persons from renouncing, demonstrates it was designed as special discriminatory class legislation and was used as such. The short time during which it was in force in itself shows that it was to serve the limited purpose of obtaining renunciations of the Nisei arbitrarily and wrongfully im-

prisoned and of no other persons. The statute states on its face that it shall be in force and effect "whenever the United States shall be in a state of war". We are still in a state of war but the statute is not in force and effect. It has been operative since July 25, 1947. In consequence, no conclusion can be drawn from these facts except that the discrimination against the Nisei was a deliberate congressional and executive policy to obtain the renunciations of a special group of imprisoned Nisei and to block all other persons in prison and out of prison from like renunciations. As such it was not only special class legislation but was applied unequally and violates the due process clause of the 5th Amendment. We direct attention also to the fact that the Justice Department cannot show that it was applied to persons other than already interned Nisei.

XIII.

THIS COURT FAILED TO CONSIDER AND PASS ON QUESTIONS THAT THE STATUTE IS VOID FOR BEING A BILL OF ATTAINDER AND AN EX POST FACTO LAW.

Congress passed the renunciation statute to obtain renunciations from the incarcerated Nisei and from no other persons for the admitted purpose of converting their unconstitutional detention into internment just to insure their continued detention "without violating the Constitution". See R. 160. The Attorney General took their renunciations for that specific purpose, ordered them interned and thereafter threatened them with removal to Japan although none of them had been guilty of violating

any law. In consequence, the statute, on its face and as applied, is nothing but a bill of attainder proscribed by Clause 3, Section 9 of Article I of the Constitution. Further, because this punishment was inflicted upon them for what the government deemed was past disloyal conduct or expression, although no hearings on such a matter had been given them, the statute, the internment and removal orders are void for being ex post facto and prohibited by Clause 3, Section 9 of Article I of the Constitution. This Court failed to consider and pass on these important questions of law.

XIV.

NO QUESTION OF ANY PLAINTIFF'S LOYALTY IS INVOLVED BUT THE GOVERNMENT'S DISLOYALTY TO THEM WAS DEMONSTRATED.

While this Court seemingly took satisfaction in declaring, on the basis of a *finding* it asserts it made in the Murakami case, that some interned Kibei were "permanently pro-Japanese" we state that any such evidence offered in that case was nothing but rank hearsay. None of the Kibei referred to therein who so unjustly were accused was a party thereto and none was given an opportunity to face his accusers. What we emphatically state is that not one was disloyal up to the time of evacuation; that none was disloyal thereafter up to the time he was compelled to elect to remain indefinitely in a concentration camp or be removed to Japan just to be liberated; and that none raised a hand against this country at any time.

What we do say and with emphasis is that the U.S. Government, the executive, legislative and judicial branches, were disloyal to these citizens and has proved that before all history by the vicious-evacuation-imprisonment-renunciation-removal program it inflicted upon them.

The government imprisoned, impoverished, hounded and harassed them—then, pursuant to a carefully-designed plan and trap, deliberately set about to get them to renounce in concentration camps so their imprisonment could be prolonged "without violating the Constitution" (R. 160)—and so the Attorney General, by later design, could remove them to Japan and thereby rid the country of a substantial number of our Nisei population. It was thus that the self-righteous government meant to *profit by its own wrongdoing* and whitewash the whole vicious program. The government sought to convert the unconstitutional detention of citizens not charged with crime into a "lawful" detention by taking renunciations and treating these as a ratification of that unconstitutional detention. If factual duress cannot be ratified by either the government or the petitioners (5 *Williston on Contracts,* p. 4348, sec. 1626) it is obvious that an unconstitutional detention cannot be converted into a lawful one by the method of ratification.

This Court's Opinion indicates an undue concern about the security of this country, seemingly being fearful that a Kibei "enemy minded renunciant" might have his citizenship confirmed. We draw attention to the fact that loyalty is not an issue in the case. Neither is the goodness of a petitioner nor the question whether he is a de-

erving person. The factual issue involved is simply whether the renunciations were induced or procured by luress. If the Court is troubled about the possibility that a Kibei renunciant conceivably could have menaced our security we point out that not one at any time did. In its mistreatment of them the government menaced the Constitution which belongs to the People. Had they been treated as other American citizens and not been made the victims of the government's enmity and barbarity and not been compelled to suffer from the ravages of the "most outrageous incident or racial discrimination in American history" (R. 206) inflicted upon them not one renunciation would have resulted.

It was an expression of loyalty on their part to this country that they did not take advantage of the Japanese government's offer in November, 1941, to evacuate persons to Japan on the ships she sent for that purpose. See H. Rep. 113, pp. 11447, 11452. It was an act of loyalty that, in response to civilian exclusion orders, they trudged into shameful concentration camps which had been prepared for them. Thereafter, it took over two years of solid confinement before any of them, to escape indefinite or possible permanent incarceration in a concentration camp, registered even a feeble protest against their lot. This silent obedience was an expression of loyalty to the government.

It was only when they had been detained for over two years and were confronted with a choice of indefinite internment and final removal to Japan or being interned to escape the danger of facing a hostile civilian community in an impoverished condition that protests were

made. The form of the protest was the signing of the renunciations the government deliberately sought from them. These were provoked by the government. The victims were under compulsion to renounce in order to secure the protective safety of internment or to secure liberation by removal to Japan. Since when has it been disloyal to perform an act which is the result of coercion? A document executed by a disloyal person as the result of coercion is as void as one executed by a loyal one. The policy of the government and its treatment of them was a constant threat—it was coercion—it was duress. All the renunciations were directly caused by governmental duress. Any supposititious question of loyalty or disloyalty on the part of any renunciant, however, has nothing to do with these cases. The question involved is simply whether or not the renunciations were the products of duress.

In effect what this Court's Opinion says is that despite the wrongful evacuation and unconstitutional imprisonment, despite the wrongdoing by the government and its agents and the duress from which each petitioner suffered some of them may have renounced voluntarily. This is equivalent to saying that a renunciation which was nothing but the utterance of "ouch" by a person immediately following the receipt of a series of brutal kicks is a voluntary expression and not the consequence of the force applied by the government boot. It does violence to reason and is downright absurd.

We direct attention also to the fact that a large number of the renunciants were taken into the armed forces upon being liberated from internment by these suits. We

direct attention also to the fact that a substantial number of those against whom removal orders are still outstanding likewise were accepted by our armed forces. A goodly number of them now are serving at the battle-front in Korea. A number of them have been casualties and a few have been brought back to army hospitals in the United States for treatment and recuperation from wounds.

We suggest that a more inapt and inappropriate quotation of dicta has not been contained in an Opinion than that appearing in the one herein taken from the context of *Doreau v. Marshall,* 170 Fed. (2d) 721, 724, that "the forsaking of American citizenship, even in a difficult situation, as a matter of expediency, with attempted excuse of such conduct later when crass material consideration suggests that course, is not duress". In that case it was held that if the appellant formally became a French citizen to prevent her incarceration in a German concentration camp she was the victim of duress and did not lose U.S. citizenship.

In the instant cases we suggest to this Court that a renunciation executed to escape indefinite or permanent internment in a concentration camp or as a method of insuring a prolongation of internment to escape the dangers of confronting a hostile community and lynch law is not a mere "difficult situation" and is not a "matter of expediency" but of necessity. These certainly are not "crass material consideration". What this Court forgot to add in its Opinion was the prefix to that quotation from the *Doreau* case which appears at page 724 and is applicable to the instant cases, viz.:

> "If by reason of extraordinary circumstances amounting to true duress, an American national is forced into the formalities of citizenship of another country, the sine qua non of expatriation is lacking. There is not authentic abandonment of his own nationality. His act, if it can be called his act, is involuntary. He cannot be truly said to be manifesting an intention of renouncing his country."

Further, loss of U.S. nationality does not result from acts of expatriation caused by duress. See *Don Reis ex rel. Camara v. Nicholls* (CCA-1), 161 Fed. (2d) 860, holding that the service of a citizen in a foreign army arising out of a choice between serving as a drafted soldier or confinement to a concentration camp did not expatriate him. See also, *Schioler v. U.S.* (DCND Ill.), 75 Fed. Supp. 353, holding that acts of expatriation taken in the face of "the gravest of dangers, even possible death or internment" were the products of duress and not binding. See also, *In re Gogal* (DCWD Pa.), holding that a citizen drafted into a foreign army does not lose his citizenship. The foregoing three cases are described by the Supreme Court in *Savorgnan v. U.S.*, 338 U.S. 491, 502, n. 18, as "cases of real duress".

This Court's Opinion expresses concern for the government. Suffice to state that the defendants, i.e., the administrative department of the present government which has caused so much of this trouble, is well able to take care of itself. This Court wastes its sympathy upon the undeserving governmental agents and agencies responsible for the terror invoked against the innocent interned Nisei. It ought to have been somewhat concerned, at least,

bout rectifying the criminal wrongs done to them by he government. All that the Court's Opinion herein has ucceeded in doing is to supply more grist for the propa- anda mills of Stalin and Mao Tse Tung to disseminate he charge throughout Asia that we are persistent in ur oppression of defenseless minorities. Because this Court's utterances in its Opinion evidences slight con- ern for the rights of these oppressed persons and an ndue concern to justify the tyrannical actions of our wn government toward them we suggest that the in- erest and policies of the United States abroad have been harmed and that the cause of our opponents in Asia has been advanced.

CONCLUSION.

For the foregoing reasons said appellees urge this Court to withdraw its Opinion herein, to set aside its orders reversing the judgments of the District Court below as to them and remanding the causes to that Court, o grant them a rehearing on the serious issues involved herein and thereupon affirm the judgments of the Court below.

Dated, San Francisco, California,
February 16, 1951.

Respectfully submitted,

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Attorney for Appellees and Petitioners.

CERTIFICATE OF COUNSEL.

The within petition for a rehearing is well founded in point of law and fact and is not interposed for delay.

Dated, San Francisco, California,
February 16, 1951.

WAYNE M. COLLINS,
Attorney for Appellees and Petitioners.